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US Army Medical Research Acquisition Activity
Procurement Stand Down

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PART I
"NO COST EXTENSIONS"

A. Introduction: What This Is About

1. This is about a finite scenario dealing with service contracts for "severable" services; doing the mission; "losing the funds;" "doing it right;" and not "doing it wrong."

2. **Scenario**

a. An agency has appropriations with a finite "life span," i.e., the appropriation ends on a specific date for purposes of funding new requirements.

b. The agency has a requirement for a severable service, in this case administrative support.

c. It awards a contract for $500,000 covering a 12 month period, ending on 30 September 2002, and funds it with the 02 OMA appropriation (one-year money that expires on 1 October 2002).

d. At some point, before the contract ends, the agency puts another $500K of 02 OMA on the contract, and before the contract ends, "extends" the contract for another 12 months, calling it a "no cost extension," and funds it with the added 02 OMA that it placed on the contract.

B. Service Contracts

1. **Obligation Scenarios**

a. Contractors provide services in one of two obligation scenarios: 1) where they definitely begin upon the award start date and finish at the end of the contract (the contract end can be a specific date, or it can be when the project is complete); or 2) where the contractor has a period during which it can be tasked (by what is often called a task or delivery order) to perform services, which are usually for a specific project or effort.

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b. In the model scenario we are addressing, i.e., the admin support contract, the contractor begins on the start date and works every work day, for twelve months, providing a constantly needed service to the agency.

2. **Severability**. Contract services are either severable or nonseverable.

a. **Severable**. A severable service is one that provides full value every day -even if it is a required every day. For example, providing daily secretarial and administrative support (we often call this "logistical support") is severable.

b. **Nonseverable**. A Nonseverable service is one that goes towards a defined end result. For example, a contract to re-carpet or paint an office is non-severable – the customer needs the whole thing done; i.e., the end result of the service.

C. Funding Service Contracts

1. **General Rule**. Services are a "bona fide need" of the year in which they are performed. Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD 64; EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 (1985).

2. **Severable Services**. Severable services are to be funded with the appropriation that is available for new obligations at the time the service is provided. DFAS-DE 7000-4, ¶4c(2); DFAS-IN 37-1, ¶9-5c; DFAS-IN 37-1, tbl. 9-1, Matter of Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 (1992); Matter of EPA Level of Effort Contracts, 65 Comp. Gen. 154 (1985).

3. **NonSeverable Services**. Nonseverable contracts are to be funded entirely with the appropriation that is available at the time of contract award –even if the period needed to accomplish the effort might extend into the next fiscal period. DFAS-IN 37-1, tbl. 8-1, DFAS-DE 7000-4, ¶4c(2); Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994); Proper Appropriation to Charge to Nonseverable Training Course, B-238940, 70 Comp. Gen. 296 (1991); Proper Fiscal Year to Charge for Contract and Contract Increases, B-219829, 65 Comp. Gen. 741 (1986); Comptroller General to W.B. Herms, Department of Agriculture, B-37929, 23 Comp. Gen. 370 (1943)

4. **Exception: Severable Services Crossing Fiscal years**. By law, agencies may fund severable service contracts with the original appropriation even though the period of performance "crosses" into the next fiscal period. 10 USC §2401a and 41 USC §253. For example, an

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agency could contract for, and fund, 12 months of services by awarding a contract on 30 September with funds that would otherwise expire at midnight.

D. "Extending" Service Contracts

1. **Severable Service Contracts**. These contracts have a precise ending date. At the ending date, the contract is over. It may not be "extended." Any such extension is a "cardinal change," and a violation of the Competition in Contracting Act. "Sole source" extensions are also not permitted –the law does not authorize extensions based on lack of acquisition planning, or in order to "save" funds that have been placed on the contract.

2. **Nonseverable Service Contracts**. These contracts may be extended to permit the contractor to finish. This may be for a number of reasons – but not because the Government is adding new, or extending old severable, requirements –that's a cardinal change. Examples of when a nonservable contract may be extended are to permit a defaulting contractor to finish; because the Government has delayed the contractor; or because the Contractor has been delayed through no one's fault.

E. Funding Changes to Contracts

1. **Proper ("Within Scope") Changes.** "In scope" changes to contracts (but not extensions of time to nonseverable contracts –that's a cardinal change), can be funded with the appropriation that was current at the time of the award-even if that appropriation is now "expired" for purposes of new contracts. DOD 7000.14-R, vol. 3, Ch. 8, 080304B; DFAS-IN 37-1, tbl. 9-7; DFAS-DE 7000-4, ¶33. If no such money is left, the change can be funded with a current appropriation.

2. **Improper ("Cardinal") Changes**. The change is to be funded at the time the change is approved. Environmental Protection Agency- Request for Clarification, B-195732, Sept. 23, 1982, 61 Comp. Gen. 609, 82-2 CPD ¶491; DFAS-IN 37-1, 9-5c(3)(1); DFAS-DE 7000-4, 33.

3. **"School Solution" Funding Corrections for Improper Extensions**

a. The "no cost extension" of the severable services contract described in ¶A.2 above is incorrect. It is beyond the "general scope" of the contract - it is a cardinal change in violation of the Competition in Contracting Act. The requirement should have been satisfied by competition for a new award. Nevertheless, the law does not demand that the "extension" be cancelled (although, if scrutinized above the command level, the GAO or

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IG/Auditors may recommend that the requirement be immediately re-competed).

b. Because the extension was funded with money that is now in an expired status for purpose of satisfying new contracts, the use of those funds is in violation of the bona fide need rule of 31 USC 1502a:

> **The balance of an appropriation or fund limited for obligation to a definite period, is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made within that period of availability….**

c. Violations of the bona fide need rule must be corrected by "accounting adjustments" that deobligate the wrong year's money and replaces it with the correct year's money. However, if there is not enough of the correct year's money (as may be the case, because bona fide need violations are often detected by audits years after the violation- and hence when the "correct" fund has gone into expired status and cannot be used to fund "new" awards), there could be an Antideficiency Act violation.

d. Violations of the Antideficiency Act require reports to the President and Congress (31 USC §1351 and §1517(b)) and OMB Cir. A-34, ¶32.2) and administrative discipline against those who were in the best position to know of, and prevent, the violation (31 USC §1349(a) and §1518). Intentional violations of the ADA are a felony (31 USC §1350 and §1519).

PART II
FRANCHISE FUNDS - NOT A CURE FOR THE BONA FIDE NEED RULE

1. **"If It Sounds Too Good To Be True" – The Cure for the Bona Fide Need Rule – Intergovernmental Revolving Funds**

> ***The use of a revolving fund does not change the period of availability of the customer agency's appropriation. It is improper for a customer funded by fiscal year appropriations to place orders in excess of legitimate needs, thereby using the revolving fund to extend the life of the appropriation***. GAO Report: Budget Issues, Franchise Fund Pilot Review, GAO-03-1069, August 2003, p.3, fn. 2

2. Some agencies have separate legal authority to operate funds that provide, among other things, contracting services. Under this authority,

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the receiving agency does not need to return the unobligated funds to the sending agency at the end of the fiscal years (as would be the requirement under an Economy Act relationship). Two examples of these funds are the Department of Interior's "GovWorks" and the GSA's Federal Technology Service.

3. There are now 58 Intergovernmental Revolving (IR) funds, often referred to as "working capital funds." An IR fund conducts continuing cycles of business-like activity within and between government agencies. It charges for the sale of products or services and uses the proceeds to finance its spending.

4. The "problem" with these funds is that they have been used by some agencies to "bank" money that would otherwise expire, which funds are then used to satisfy the bona fide needs of following fiscal years.

5. This is improper.[1] As the DOD Comptroller has explained:

> ***Every order under an interagency agreement must be based upon a legitimate, specific and adequately documented requirement representing a bona fide need of the year in which the order is made….If these basic conditions are met, the [IR fund agencies] may retain and promptly obligate funds in the following year fiscal year. On the other hand, an interagency agreement may not be used in the last days of the fiscal year solely to prevent funds from expiring or to keep them available for a requirement arising in the following fiscal year***. USOD, Comptroller Memorandum, 25 Sept 2003, Subject: Fiscal Principals and Interagency Agreements (emphasis in original)

PART III
SELECTING PROCUREMENT vs. ASSSISTANCE

1. **Introduction**. Federal agencies have inherent authority to use procurement contracts. Federal agencies need specific authority to award assistance agreements (grants and cooperative agreements). As a general proposition, it is easier to award assistance agreements than procurement contracts. Agencies cannot use assistance agreements to obtain support for their missions.

2. **Statutory Criteria**

[1] For a report dealing with how the DOD IG thinks the Army mishandled these funds, see DOD IG Report: Army Claims Service Military Interdepartmental Purchase Request (D-2002-109), June 19, 2002.

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31 USC §6303 Using procurement contracts
An executive agency shall use a procurement contract as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when-

(1) the **principal purpose of the instrument is** to acquire (by purchase, lease, or barter) property or services **for the direct benefit or use of the United States Government**; ….

31 USC §6304. Using Grant Agreements
An executive agency shall use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when-

(1) the **principal purpose of the relationship** is to transfer a thing of value to the State or local government or other recipient **to carry out a public purpose of support or stimulation authorized by a law of the United States** instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

(2) **substantial involvement is not expected** between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

31 USC § 6305. Using Cooperative Agreements
An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when-

(1) [same as 31 6304(1)]; and

(2) **substantial involvement is expected** between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

3. **Practical Exercise**. The Agency is charged by Congress with a mission to conduct cancer research, and it has authority from Congress to use assistance agreements for R&D. The Agency identifies an organization with considerable knowledge of the capabilities of the R&D community. It awards it a cooperative agreement to help it identify and liaison with the R&D community, and to inform researchers of the Agency's assistance funding opportunities.

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PART IV
COMPETITION FOR ASSISTANCE

1. **No "Earmarked" Congressional Grant Funds – For Anyone**. By law, Congress has severely limited its ability to make sole source awards of assistance agreements.

2. **Statutes**

10 U.S.C. §2361. Award of Grants and Contracts to Colleges and Universities: Requirement of Competition.

(a) The Secretary of Defense ***may not make a grant*** or award a contract to a college or university for the performance of research and development, or for the construction of any research or other facility, ***unless-***

(1) in the case of a grant, the grant is made using ***competitive procedures***; …

(b) (1) ***A provision of law may not be construed as modifying or superseding the provisions of subsection (a), or as requiring funds to be made available by the Secretary of Defense to a particular college or university by grant or contract, unless that provision of law-***

(A) specifically refers to this section;

(B) specifically states that such provision of law modifies or supersedes the provisions of this section; and

(C) specifically identifies the particular college or university involved and states that the grant to be made or the contract to be awarded, as the case may be, pursuant to such provision of law is being made or awarded in contravention of subsection (a).

(2) A grant may not be made, or a contract awarded, pursuant to a provision of law that authorizes or requires the making of the grant, or the awarding of the contract, in a manner that is inconsistent with subsection (a) until-

(A) the Secretary of Defense submits to Congress a notice in writing of the intent to make the grant or award the contract; and

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(B) a period of 180 days has elapsed after the date on which the notice is received by Congress.

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10 U.S.C. §2374. Merit-Based Award of Grants for Research and Development

(a) It is the policy of Congress that an agency named in section 2303(a) of this title [DOD] should not be required by legislation to award a new grant for research, development, test, or evaluation to a non-Federal Government entity. It is further the policy of Congress that any program, project, or technology identified in legislation ***be awarded through merit-based selection procedures***.

(b) A provision of law may not be construed as requiring a new grant to be awarded to a specified non-Federal Government entity unless that provision of law -

(1) specifically refers to this subsection;

(2) specifically identifies the particular non-Federal Government entity involved; and

(3) specifically states that the award to that entity is required by such provision of law in contravention of the policy set forth in subsection (a).

3. **Summary**

a. No directed awards to a college or university – even if they are mentioned in the Conference Report- unless: the appropriation act, or other law, states the award to the university by name, and specifies that it is in exception to 10 USC §2361.

b. No award of an agreement assistance- to anyone - without competition.